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IN THE

Supreme Court of the United States

OCTOBER TERM, 1903

THE HELENA WATER WORKS COMPANY,

Appellant.

versus

THE CITY OF HELENA,

Appellee.

BRIEF OF APPELLANT.

STATEMENT OF THE CASE.

This suit was instituted in the circuit court of the United States, ninth circuit, district of Montana, by The Helent Water Works Company, a New Jersey corporation, against the City of Helena, a municipal corporation of Montana, for the purpose of obtaining an injunction restraining the said city from acquiring a water system and supply and engaging in the business of furnishing water to itself and its inhabitants in competition with appellant.

In the month of January, 1890, the city council of said City of Helena adopted, and the mayor of said city approved, Ordinance No. 248 entitled, "To provide the City of Helena and its inhabitants with a permanent water supply." A copy of this ordinance is made part of the bill as

Exhibit A. (Record, pages 9 to 18). By this ordinance a franchise to construct, maintain and operate a water system in the City of Helena for the purpose of supplying said city and its inhabitants with water, for the term of twenty years was granted to the Helena Consolidated Water Company, its successors and assigns. The ordinance was accepted, and the requirements of Sec. 25 thereof with reference to furnishing a bond and a certain relinquishment were complied with. The Helena Consolidated Water Company expended several hundred thousand dollars in providing a water supply and system. The appellant is the successor of the Helena Consolidated Water Company, and has been, since the month of April, 1899, the owner and in possession of said system and supply, and engaged in furnishing water to the said city and its inhabitants. There is no question but that the appellant and its grantors and predecessors in interest have complied with said ordinance, and the same is in full force and effect. (Record p. 49).

Sec. 26 of said ordinance reads as follows:

"It is hereby declared and understood to be of the essence of the agreement and the acceptance hereof that the said Helena Consolidated Water Company shall, at all times during the term of such agreement, provide all the inhabitants of the city, whatever their number may be, with a full, ample and sufficient supply of good, pure and wholesome and clear water, and shall convey, distribute and sell the same to them upon the terms and conditions herein provided and expressed." (Record p. 18).

In the month of December, 1899, the city council of the City of Helena adopted, and the mayor of said city approved, Ordinance No. 467, entitled: "An ordinance relating to the procurement of a water system and supply for the City of Helena, which shall own and control said system and supply and devote the revenue derived therefrom to the payment of the debt incurred therefor, and provid-

ing for the submission to the taxpayers affected thereby of the question of extending the limit of indebtedness of said city over and above the three per cent. limit provided by Section 6 of Article XIII of the Constitution of the State of Montana, for the purpose of procuring such water system and supply." This ordinance is made Exhibit B to the bill, and is found in the record on pages 18 to 20. Pursuant to the provisions of this ordinance a notice of election was given, and the election was held on the 18th day of January, 1900, at which a majority of the voters voted in favor of the proposition to extend the limit of indebtedness for the purpose mentioned. In December, 1900, the city council adopted, and the mayor approved, Ordinance No. 483, entitled: "Amending Ordinance No. 482, authorizing the taking of all of the water and water rights of McClellan Creek, and those water rights of Prickly Pear Creek comprising the waters of said McClellan Creek, for the purpose of procuring a water supply for the City of Helena, Montana, which shall own and control the same, and authorizing the commencement of condemnation proceedings for such purpose." This ordinance is made a part of the bill as Exhibit C, and is contained in the record on pages 20 and 21. The city council also, in the month of April, 1901, adopted a preamble and resolution authorizing the purchase of certain water rights for the consideration of $30,000. This preamble and resolution is made a part of the bill as Exhibit D. (Record p. 22).

Par. 27 of the bill reads as follows:

"And your orator further shows and alleges that the said ordinances numbered respectively 467 and 483, and the preamble and resolution adopted and approved as aforesaid, impair the obligation of the contract between your orator and said city resulting from the passage, approval and acceptance of said Ordinance No. 248, in violation of Section 11, Article III, of the constitution of the

State of Montana, and Section 10, Article I, of the constitution of the United States." (Record p. 7).

Par. 29 of the bill is as follows:

"And your orator further shows that if the said defendant, the City of Helena, is not enjoined and restrained from carrying out its design and purpose of acquiring a water plant and system and supply, and from engaging in furnishing the said city and its inhabitants with water, it will, as your orator is informed, verily believes and alleges, acquire such plant, system and supply and engage in said business, thereby taking the property of your orator, consisting of the franchise granted by said ordinance No. 248, the rights and privileges conferred thereby, the contract contained therein, and the water plant, system and supply of your orator, without due process of law, and in violation of the fourteenth amendment to the constitution of the United States." (Record p. 7).

The indebtedness of the City of Helena is now and has been for several years in excess of the three per cent limit prescribed in Sec. 6 of Art. XIII of the constitution of Montana, which provides as follows:

"No city, town, township or school district shall be allowed to become indebted in any manner or for any purpose to an amount, including existing indebtedness, in the aggregate exceeding three per centum of the value of the taxable property therein, to be ascertained by the last assessment for the state and county taxes previous to the incurring of such indebtedness, and all bonds or obligations in excess of such amount given by or on behalf of such city, town, township or school district shall be void; *Provided, however*, that the legislative assembly may extend the limit mentioned in this section, by authorizing municipal corporations to submit the question to a vote of the taxpayers affected thereby, when such increase is necessary to construct a sewerage system or to procure a supply of water for such municipality which shall own and control said water supply and devote the revenues derived therefrom to the payment of the debt."

Subd. 64 of Sec. 4800 of the Political Code of Montana,

as amended by an act approved March 8, 1897, (Session Laws of 1897, p. 203), provides in part as follows:

"The city or town council has power:

"64. To contract an indebtedness on behalf of a city or town, upon the credit thereof, by borrowing money or issuing bonds for the following purposes, to-wit: erection of public buildings, construction of sewers, bridges, waterworks, lighting plants, supplying the city or town with water by contract, the purchase of fire apparatus, the construction or purchase of canals or ditches and water rights for supplying the city or town with water, and the funding of outstanding warrants and maturing bonds; provided, that the total amount of indebtedness authorized to be contracted in any form, including the then existing indebtedness, must not, at any time, exceed three per centum of the total assessed valuation of the taxable property of the city or town, as ascertained by the last assessment for State and County taxes; provided, that no money must be borrowed on bonds issued for the construction, purchasing or securing of a water plant, water system, water supply, or sewerage system, until the proposition has been submitted to the vote of the taxpayers affected thereby of the city or town and the majority vote cast in favor thereof; and, further provided, that an additional indebtedness shall be incurred, when necessary, to construct a sewerage system or procure a water supply for the said city or town which shall own or control said water supply and devote the revenue derived therefrom to the payment of the debt: The additional indebtedness authorized, including all indebtedness heretofore contracted, which is unpaid or outstanding, for the construction of a sewerage system, shall not exceed ten per centum over and above the three per cent. heretofore referred to, of the total assessed valuation of the taxable property of the city or town as ascertained by the last assessment for State and County taxes; and, provided further, that the above limit of three per centum shall not be extended, unless the question shall have been submitted to a vote of the tax-payers affected thereby and carried in the affirmative by a vote of the majority of said tax-payers who vote at such election. It is further provided, that

whenever a franchise has been granted to, or a contract made with, any person or persons, corporation or corporations, and such person or persons, corporation or corporations, in pursuance thereof, or otherwise, have established or maintained a system of water supply or have valuable water rights or a supply of water, desired by the city or town for supplying the said city or town with water, the city or town granting such franchise, or entering in such contract, or desiring such water supply, shall, by the passage of an ordinance, give notice to such person or persons, corporation or corporations, that it desires to purchase the plant and franchise and water supply of such person or persons, corporation or corporations, it shall have the right to so purchase the said plant or water supply upon such terms as the parties agree; in case they cannot agree, then the said city or town shall proceed to acquire the same under the laws relating to the taking of private property for public use; and any city or town acquiring property under the laws relating to the taking of private property for public use shall make payment to the owner or owners of the plant or water supply of the value thereof legally determined, within six months from and after final judgment is entered in the condemnation proceedings. For the purpose of providing the city or town with an adequate water supply for municipal and domestic purposes, the city or town council shall procure and appropriate water rights and title to the same and the necessary real and personal property to make said rights and supply available, by purchase, appropriation, location, condemnation or otherwise."

The city of Helena was created by a special act of the Territorial Legislature in 1881. The charter of the city conferred the following powers, among others, upon the city council: (a) "To make regulations to secure the general health of the inhabitants;" (b) "To provide the city with water, erect hydrants and pumps, build cisterns and dig wells in the streets for the supply of engines and buckets;" (c) "To provide for the prevention and extin-

guishment of fires." (See charter of city approved Feb. 22, 1881; Laws of 12th Territorial Legislature, p. 112.)

The city became subject to the general municipal corporation act of the state in 1895. This act, as amended by an act approved March 8, 1897, conferred power upon the city council "To adopt, enter into, and carry out means for securing a supply of water for the use of a city or town, or its inhabitants." (See Session Laws of 1897, p. 212.)

It is alleged in the bill of complaint that the appellant and its predecessors and grantors have fully complied with ordinance No. 248. In the agreed statement of facts it is stipulated that these allegations of the bill are true, (Record p. 44) and that said ordinance is in full force and effect. (Record, p. 49.)

In addition to the claim that the ordinances ~~and preamble~~ complained of have the effect of impairing the obligation of the contract contained in ordinance No. 248, appellant further maintains:

1. That the said city is not authorized to incur an indebtedness for a water supply and system for the reason that the limit of its indebtedness can only be extended, as provided in Sec. 6 of Art. XIII of the constitution of Montana, by a special statute, and the general statute—subd. 64 of Sec. 4800 of the Political Code, as amended—is unauthorized and unconstitutional.

2. That the City of Helena, having granted a franchise to the Helena Consolidated Water Company, its successors and assigns, and entered into the contract evidenced by ordinance No. 248, pursuant to which the water works of appellant were established and have been maintained, the said city is precluded by the provisions of subd. 64 of sec. 4800 of the Political Code, as amended, from acquiring any plant or supply except that now being operated by appellant.

3. That the city, having provided a "full, ample, and sufficient" supply of water for its inhabitants by contract, is without power to supply the inhabitants with water, for the reason that the only purpose which it could have by so doing would be to make a profit therefrom. The city is not authorized to engage in a business of a private nature for the sole object of gain,—at least in the absence of an express delegation of power to do so.

The appellant asserts a right to the relief demanded in the bill in the dual capacity of a taxpayer and as the successor of the Helena Consolidated Water Company to the franchise granted by, and contract contained in, ordinance 248.

The case was heard in the circuit court upon an agreed statement of facts. (Record, pp. 44 to 49 inclusive). In this statement of facts it is stipulated "That the revenue for said purpose (the purpose of procuring a supply and system) will be created and raised by borrowing money or raising funds within the limit of indebtedness as heretofore or hereafter to be extended in accordance with the requirements of the constitution and the provisions of the statutes of the State of Montana in that behalf, unless it shall be adjudged that it (the city) has no legal or equitable right to do so on account of the facts and admissions hereinbefore stated and made." (Record, p. 49).

The circuit court rendered a decree enjoining the city "from acquiring a water plant, system or supply (other than the plant, system and supply of complainant) to be owned or controlled by it, for the purpose of supplying its inhabitants, or any thereof, with water, and from furnishing or supplying said inhabitants, or any thereof, with water until after the expiration of the franchise granted to the Helena Consolidated Water Company, its successors and assigns, by Ordinance No. 248 of the ordinances of said city, to-wit, January 15th, 1910." (Record, p. 129).

Counsel for the city excepted to the decree upon the ground that the same should not restrain the city from acquiring a system and supply for furnishing water to its inhabitants, but should be limited to restraining the city from supplying water to the inhabitants during the life of the franchise. (Record, p. 130). An appeal was taken from this decree to the circuit court of appeals, where the same was reversed. The water company thereupon appealed to this court.

SPECIFICATION OF ERRORS.

1. The circuit court of appeals erred in deciding that the City of Helena did not, by virtue of the passage, approval and acceptance of ordinance No. 248, enter into a contract with the Helena Consolidated Water Company, its successors and assigns, that it would not engage in the business of supplying water to the inhabitants of said city in competition with said water company, its successors and assigns, during the term of the franchise granted by said ordinance, to-wit: twenty years.

2. The said court erred in holding and deciding that sec. 6 of art. XIII of the constitution of the State of Montana does not require a special statute extending the limit of indebtedness of the City of Helena before the additional indebtedness for a water supply and system can be incurred, and that the general statute in force is sufficient for such purpose.

3. The court erred in deciding that the provision of subd. 64 of sec. 4800 of the Political Code of Montana, as amended, which requires the City of Helena to acquire the plant and supply of appellant, is in violation of the Constitution of Montana.

4. The court erred in deciding that the questions as

to whether or not the statutes of the State of Montana authorize the City of Helena to incur an indebtedness for the purpose of acquiring a water supply and system to be owned and controlled by said city, and authorize said city to acquire a system and supply other than that belonging to appellant, are foreclosed and waived by the agreed statement of facts.

5. The court erred in deciding that subd. 79 of sec. 4800 of the Political Code of Montana, as amended, confers power upon the city to acquire a system and supply and furnish water to the inhabitants.

ARGUMENT AND AUTHORITIES.

HAS THE CITY THE RIGHT TO ENGAGE IN THE BUSINESS OF SUPPLYING WATER TO ITS INHABITANTS IN COMPETITION WITH APPELLANT?

We contend that by virtue of the acceptance of ordinance No. 248, a contract resulted by which appellee agreed that it would not engage in the business of supplying water to its inhabitants during the term of said contract.

The power of the City of Helena to make such a contract cannot be controverted.

Walla Walla v. Walla Walla Water Co., 172 U. S. 1.

If such contract was made, in view of the action already taken by the city and its avowed intention to become a competitor of appellant, the decree of the circuit court was proper and should have been affirmed by the circuit court of appeals.

Walla Walla v. Walla Walla Water Co., 172 U. S. 1.
Vicksburg Water Co. v. Vicksburg, 185 U. S. 65.

We concede that the contract evidenced by ordinance No. 248 does not expressly provide that the appellee shall not engage in the business of supplying its inhabitants with

water. We do say, however, that by the contract entered into it was agreed that the Helena Consolidated Water Company, its successors and assigns, should furnish water to all the inhabitants desiring to purchase the same, for the period of twenty years, and that, as an incident thereto, there was an implied agreement that the city would not engage in such business as a competitor of appellant.

Is there such an implied contract? In considering this question, which depends upon the construction of said ordinance No. 248, it is important to understand the nature of the power by virtue of which a city is authorized to provide a supply of water for its inhabitants.

The powers of a city are divided into two classes, namely, private and public. In the exercise of its private powers it is regarded the same as a private corporation.

Dillon, Munic. Corp., Sec. 66.
Illinois Trust & Savings Bank v. Arkansas City, 76 Fed. 271.
Walla Walla v. Walla Walla Water Co., 172 U. S. 1.
People v. Detroit, 28 Mich. 228.
San Francisco Gas Co. v. San Francisco, 9 Cal. 453.
Bailey v. New York, 3 Hill, 531.

In the case of Illinois Trust & Savings Bank v. Arkansas City, *supra*, the court said: "A city has two classes of powers—the one legislative, public, governmental, in the exercise of which it is a sovereignty and governs its people; the other, proprietary, quasi private—conferred upon it, not for the purpose of governing its people, but for the private advantage of the inhabitants of the city and of the city itself as a legal personality."

In the opinion in the case of People v. Detroit, *supra*, Justice Cooley said on page 238: "If the authorities are examined it will be found that these powers and capacities, and the interests which are acquired under them, are usually spoken of as *private*, in contradiction to those in

which the state is concerned, and which are called *public;* thus putting these corporations, as regards all such powers, capacities and interests, substantially on the footing of private corporations."

In the case of San Francisco Gas Co. v. San Francisco, *supra,* Justice Field said on page 469: "The distinction alluded to refers to the double character of a municipal corporation; its public and political character, in which it exercises subordinate legislative powers, and its private character, in which it exercises the powers of an individual or private corporation. * * * The purchase of gas involves only the exercise of the power of a private corporation; it requires no exercise of any political power. It is as much an act of a private character as if made by a private corporation."

A city in providing its inhabitants with a supply of water exercises its private powers—sometimes termed its business or proprietary powers.

Illinois Trust & Savings Bank v. Arkansas City, 76 Fed. 271.
Little Falls Elec. & W. Co. v. Little Falls, 102 Fed. 663.
Baily v. Philadelphia, 39 L. R. A. 837.
Western Savings Fund Society v. Philadelphia, 72 Am. Dec. 730.
Lynch v. City of Springfield, 54 N. E. 871.
Pike's Peak Power Co. v. Colorado Springs, 105 Fed. 1.

In the opinion in the case of Illinois Trust & Savings Bank v. Arkansas City, *supra,* the court said: "In contracting for waterworks to supply itself and its inhabitants with water, the city is not exercising its governmental or legislative powers, but its business or proprietary powers. The purpose of such a contract is not to govern its inhabitants, but to obtain a private benefit for the city itself and its denizens."

In the case of Baily v. Philadelphia, *supra,* which involved the question of the right of the city of Philadelphia to lease its gas works and the validity of such lease, the court said: "The second proposition of the appellants is that the ordinance assumes in respect to the public lighting to delegate a public legislative power, and in respect to the private lighting to confer a monopoly on the grantee, and in both cases to bind the discretion of councils for a long term of years. It is manifest that this proposition in the use of the phrase, 'public legislative power,' comes back, as already indicated, to the contention that public lighting is a municipal duty. It is true that it is a legislative power, in the sense that it is the exercise of the will of the owner with respect to ownership of the property. If such ownership was coupled with a municipal duty, such duty could not be escaped by lease or other form of delegation. But the gas works, as already discussed, are held by the city as a business corporation. * * *

"It is further argued that the lease undertakes to bind the discretion of councils for a long term of years. This again comes back to the contention that lighting the city is a strictly municipal or governmental function, as to which councils cannot bind their successors. But, as already held, the city is acting in its business capacity only, and the contract binds it in that capacity."

In the case of Western Savings Fund Society v. Philadelphia, *supra,* the court said: "But the contracts which a municipal corporation may make for the purpose of supplying the inhabitants with gas light in their streets and houses relate to the 'things of commerce,' as distinguished in the civil law from the 'things public,' which are regulated by the sovereign. Such contracts are not made by the municipal corporation, by virtue of its powers of local sovereignty, but in its capacity of a private corporation. The supply of gas light is no more a duty of sovereignty

than the supply of water. Both these objects may be accomplished through the agency of individuals or private corporations, and in very many instances they are accomplished by those means. If this power is granted to a borough or a city, it is a special private franchise, made as well for the private emolument and advantage of the city as for the public good. The whole investment is the private property of the city, as much so as the lands and houses belonging to it."

See also

Lynch v. City of Springfield, 54 N. E. 871.
Aldrich v. Tripp, 23 Am. Rep. 434.
White v. Meadville, 34 L. R. A. 567.

The fact that the right to furnish water to the inhabitants of a city is one which may be conferred upon an individual or private corporation is sufficient of itself to show that the right is not a public or governmental right. The right to exercise a public or governmental power cannot be delegated.

As a city acts in its private, proprietary, or business character or capacity in providing a supply of water for its inhabitants, it follows that the exercise of the power to provide such a supply is a right or privilege, and not a duty. As was said by the court in the case of Baily v. Philadelphia, *supra*: "The gas works are the property of the city of Philadelphia, not as a municipality, but as a business corporation. However much the idea that the city is not required by its municipal duty to supply its citizens with light in the streets and public places may seem to fall below the modern conception of a city, yet it it is beyond question, on settled legal principles, that in the performance of that function the city acts under authority merely, and not under municipal obligation. This was the rule of the common law, and no statute in reference to the city of Philadelphia has altered it. Hence the

city may change its mode of action, or cease to act altogether, in its discretion, and the discretion is purely legislative. The courts have no power to interfere unless the proposed action contravenes some express statute or violates some binding contract. These principles are elementary, and need not be enlarged upon since they are conceded by the learned counsel for appellants."

In the construction of contracts made with a municipal corporation in the exercise of its private, proprietary, or business powers, the same rules apply as in the construction of a contract with an individual or private corporation.

Illinois Trust & Savings Bank v. Arkansas City, 76 Fed. 271.

Little Falls Elec. & W. Co. v. Little Falls, 102 Fed. 663.

San Francisco Gas Co. v. San Francisco, 9 Cal. 453.

In the opinion in the case of Huidekoper's Lessee v. Douglass, 3 Cranch, 1, Chief Justice Marshall, on page 70, said: "This is a contract; and although a state is a party, it ought to be construed according to those well established principles which regulate contracts generally."

Sec. 26 of the ordinance reads as follows: *"It is hereby declared and understood to be of the essence of the agreement and the acceptance hereof that the said Helena Consolidated Water Company shall, at all times during the term of such agreement, provide all the inhabitants of the city, whatever their number may be, with a full, ample, and sufficient supply of good, pure and wholesome and clear water, and shall convey, distribute and sell the same to them upon the terms and conditions herein provided and expressed."* (Record, p. 18).

In the lower courts, counsel for the city admitted that there was a contractual obligation on the part of the Helena Consolidated Water Company, its successors and as-

signs, to supply water to the inhabitants, but it was claimed that such obligation was limited to the period of five years, by virtue of the provisions of sec. 6 of the ordinance. The circuit court of appeals seems to have adopted this view. (Record, pp. 155 and 156).

WHAT IS THE TERM OF THE AGREEMENT REFERRED TO IN SEC. 26?

The title of the ordinance is: "To provide the City of Helena and its inhabitants with a *permanent* water supply." (Record, p. 9). The word "permanent" is significant of the intention of the city with reference to the term of the contract. It is recited in the ordinance that the City of Helena advertised for proposals for a water supply for the use of said city and the inhabitants thereof, and that the contract was awarded to the Helena Consolidated Water Company as assignee and successor of George F. Woolston, who was the lowest responsible bidder. The grant made by the first and second sections of the ordinance was for the purpose of enabling the Helena Consolidated Water Company, its successors and assigns, to perform the contract, and the term of the grant is necessarily the term of the contract.

In section 6 of the ordinance it is provided: "The said Helena Consolidated Water Company shall furnish and provide a full, ample and sufficient supply of good, pure, wholesome and clear water for the use and wants of the inhabitants of said city, and to provide said city with water for fire, sewerage (maintenance and construction), and for other purposes; and such supply shall be full, ample and sufficient for the present population of said city, and for the future population of the said city as the same may be from time to time during the full term of

five years; and said water shall be pure, wholesome and free from animal, vegetable or mineral substances, such as would render it unhealthy or unfit for domestic use." (Record, p. 11).

It will be noticed that this section has reference to the supply for both the city and its inhabitants. The words "such supply" contained in the second clause refer to the supply mentioned in the first clause. The provision that "such supply shall be full, ample and sufficient for the present population of the said city, and for the future population of the said city as the same may be from time to time during the full term of five years," relates solely to the extent of the supply, and not to the time for which the supply should be furnished. That this is the correct construction of this section is clearly evidenced by sections 17 and 26 of the ordinance.

The parties might have provided that the supply for the *city* and its *inhabitants* should be sufficient for a population of fifty thousand or any other number, instead of providing that such supply should be sufficient for the population during a given period. If provision had been made for a supply for the city and its inhabitants sufficient for a certain population in lieu of the stipulation actually made, there could be no controversy in regard to the term of the agreement to supply the inhabitants. When, therefore, we consider the purpose of the clause in said section 6, which is not only evidenced by the language thereof, but by the other provisions of the ordinance, it cannot with any degree of reason be said to determine the term of the contract or agreement mentioned in sec. 26. It could with as much reason be said that the provision of sec. 26, with reference to the quality of the water, was only operative for a period of five years, because of section 6, as to say that the requirement to furnish water to all of the inhab-

itants was limited to that period on account of said section.

The city contracted by the ordinance to take and pay for water for the period of five years. It did not have the power to contract that the inhabitants would purchase water for any period. It did have the authority, however, to provide a supply of water for the inhabitants, and contract that such supply should be sufficient for the full term of twenty years. It might have contracted that both the supply for the city and its inhabitants should be sufficient during the life of the franchise, but it did not do so. The object of section 6 of the ordinance was to insure a supply for both the city and the inhabitants during the period for which said city had contracted to take a supply, whereas, the purpose of section 26 was to make provision for a supply for the inhabitants independent of a supply for the city during the entire "term of the agreement." In section 6 the supply for the inhabitants is limited to the population of the city during the period of five years; while in section 26 the language "all of the inhabitants, whatever their number may be, at all times during the term of such agreement" is used. By reading sections 6 and 26 together and giving effect to all of the language of both sections, the intent to contract for a supply for the inhabitants during the life of the franchise is plain.

Section 1 of the ordinance contains the grant of a franchise for the full term of twenty years, subject to the provisions of the ordinance contained in section 16, establishing maximum rates. When the grant was accepted a contract resulted by which the city was prevented from reducing the rates fixed, and the grantee was prohibited from charging more for water than the maximum rates established. We have then a contract in this particular the term of which is necessarily the life of the franchise.

The provisions of the ordinance relating to the pressure

to be maintained (Sec. 7, Record, p. 11), requiring the laying of such additional mains as the city council might order (Sec. 10, Record, p. 13); providing for the furnishing of all water required by the city for the use of any and all buildings owned and occupied by it for municipal purposes, and all water necessary for street sprinkling purposes, free of charge (Sec. 11, Record, pp. 13, 14); conferring the right upon the mayor or any committee of the city council to have access to the entire works and system of the Helena Consolidated Water Company, and the right to test and inspect the same (Sec. 14, Record, p. 14); requiring the keeping and maintaining of a certain depth of water in the reservoirs (Sec. 22, Record, p. 17); each and all impose contractual duties and obligations to be performed in connection with the exercise of the franchise granted, and are necessarily operative during the life of the franchise.

Turning to sec. 17 of the ordinance we find it provided therein "that said company shall not refuse to permit connections to be made by or to sell or deliver water to any persons who shall offer to pay for the same, and shall comply with the provisions of this ordinance, and with such regulations as may be from time to time prescribed by the city council of said city, and the reasonable rules and regulations of said company." This provision imposed upon the grantee of the privilege and franchise, granted by sec. 1 of the ordinance, its successors and assigns, the duty and obligation of selling water to all persons, and does not state any time within which such obligation should be in force. It is not reasonable to suppose that it was the intention of the parties that the obligation imposed by sec. 17 should continue only for the period of five years, when the privilege or franchise in the exercise of which the obligation was to be performed was granted for the term of 20 years.

In sec. 26 the words "of the essence of the agreement and

the acceptance hereof" referred to ordinance No. 248. Such "agreement" and the words "term of the agreement" mean the term of the agreement mentioned in sec. 1 of the ordinance. This is plain when it is observed that there are a large number of special provisions in the ordinance to which attention has been called, and that all combined form the "agreement" entered into by the acceptance of the ordinance. Therefore the words "term of such agreement," in sec. 26, cannot be limited to apply only to the particular provision contained in any one section of the ordinance, for it conclusively follows from many of the sections that the obligations and duties imposed upon the grantee of the franchise, its successors and assigns, were to continue for twenty years, and that the agreement resulting from the acceptance of the ordinance was to be in force for that time. Sec. 1 of the ordinance, however, definitely fixes the term of the agreement, and neither sec. 6 nor any other section of the ordinance has changed it.

Manifestly, sec. 26 was framed after the preceding sections had been prepared as a complete ordinance, and was intended to remove any doubt that water should be provided to the inhabitants during the life of the franchise, to-wit, twenty years.

To give to sec. 26 the construction contended for in behalf of appellee and adopted by the circuit court of appeals renders the same nugatory. In other words, if the contractual obligation to furnish water to the inhabitants of the city is limited to the term of five years, as this obligation is imposed by sec. 6, there was no occasion for incorporating sec. 26 in the ordinance. The construction we contend for makes sec. 26 operative and consistent with sec. 6 and every other provision of the ordinance. It is a rule of construction of contracts and statutes that such a construction should be adopted, if reasonable, as will give effect to every part.

It is undoubtedly true that complainant is under obligation to furnish water to the city and its inhabitants without discrimination, independent of any express contract, so long as it exercises the license or permit to occupy the streets, and continues to operate its plant. By the authorities it is said that the obligation arises from an implied condition attaching to the grant of the franchise, and also from the fact that the property employed in the exercise of the franchise is devoted to the public use and is affected with a public interest. Notwithstanding this obligation, however, there is no duty devolving upon complainant, independent of contract, to continue the business of furnishing water. Unless the complainant has contracted not to do so, it has the right to remove its pipes and mains from the streets and abandon the operation of its plant at any time.

San Antonio Street Ry. Co. v. State, 35 L. R. A. 662.
State v. Helena Power & Light Co., 22 Mont. 391.
York & N. Midland Ry. Co. v. Queen, 1 E. & B. 856.
Nor Pac. R. R. Co. v. Washington, 142 U. S. 492.
Baily v. Philadelphia, 39 L. R. A. 837.

In the absence of a contract the grantee of the franchise could not be required to furnish water to the city, free of charge, for the purposes provided in Sec. 11 of the Ordinance. There are many other obligations imposed upon the grantee of the franchise, its successors and assigns, by the ordinance, which would not exist except for the contract.

When we consider that the intention and object of the city was to provide a permanent supply of water for itself and its inhabitants by contract, as shown by the title of and recitals in the ordinance; that the franchise was granted for the purpose of enabling the grantee, its successors and assigns, to perform the contract, and that a supply of

water during the life of the franchise could only be insured by contract; it is idle to contend that the term of the agreement mentioned in Section 26 of the Ordinance is different from the term of the franchise.

In the opinion of the judge of the district court of Lewis and Clarke County, Montana, in a proceeding involving a construction of said ordinance 248, which opinion is found in the record at page 100, it is said: "On January 15th, 1890, an ordinance was adopted by the City of Helena and accepted by the company, pursuant to the terms of which the latter was to furnish all of the inhabitants of Helena with water at certain prescribed rates for 20 years; and for the first five years of said period the city itself for city purposes, if it should desire to purchase water from the company."

We therefore submit that the term of the agreement mentioned in sec. 26 of the ordinance is twenty years—the life of the franchise—and that the contractual obligation to furnish water to all of the inhabitants of the city will remain in full force until the expiration of the franchise in the month of January, 1910.

WHAT IS THE EFFECT OF THE CONTRACT TO SUPPLY ALL OF THE INHABITANTS OF THE CITY WITH WATER ON THE RIGHT OF THE CITY TO BECOME A COMPETITOR OF APPELLANT?

In view of the decision of this court in the Walla Walla Case, 172 U. S. 1, the only question to be determined on this branch of the case is whether or not the contract is to be so construed and interpreted as to preclude the city from furnishing its inhabitants with water in competition with appellant. Counsel for the city maintain that the contract cannot be so construed, for the reason that the fran-

chise granted to the Helena Consolidated Water Company is not exclusive, and because the contract does not contain an express provision prohibiting the city from acquiring a plant and supply, or engaging in furnishing water in competition with appellant. It is said by counsel for the city that the Walla Walla Case is distinguishable from the case before the court because of the express provision in the ordinance considered in that case, to the effect that the city of Walla Walla would not erect, maintain, or become interested in any water works, except those provided for by the ordinance. We submit, however, that the decision in that case would not have been different if this express provision had been omitted from the ordinance.

In Sec. 7 of the ordinance considered in the Walla Walla Case it was provided:

"For all the purposes above enumerated said Walla Walla Water Company shall furnish an ample supply of water, and for domestic purposes, including sprinkling lawns, shall furnish an ample supply of good wholesome water, at reasonable rates, to consumers at all times during the said period of twenty-five (25) years."

In the opinion of the court it is said:

"The argument of the city is that the council exceeded its powers in authorizing the contract with the water company for a continuous supply of water and the payment of rentals for 25 years, and that such contract was specially obnoxious in its stipulation that the city should not construct waterworks of its own during the life of the contract. The several objections to the contract are specifically stated by counsel for the city in their brief as follows:

"(a). The contract creates a monopoly, which, in the absence of an express grant from the legislature of power so to do, or such power necessarily implied, is void as in contravention of public policy;

"(b). The contract is void as an attempt to contract away a part of the governmental power of the city council."

In considering the objection made to the provision that the city would not erect waterworks of its own during the life of the contract, the court said:

"6. Nor do we think the contract objectionable in its stipulation that the city would not erect waterworks of its own during the life of the contract. There was no attempt made to create a monopoly by granting an exclusive right to this company, and the agreement that the city would not erect waterworks of its own was accompanied, in section 8 of the contract, with a reservation of a right to take, condemn, and pay for the waterworks of the company at any time during the existence of the contract. Taking sections 7 and 8 together, they amount simply to this: That, if the city should desire to establish waterworks of its own, it would do so by condemning the property of the company, and making such changes in its plant or such additions thereto as it might deem desirable for the better supply of its inhabitants; but that it would not enter into a direct competition with the company during the life of the contract. *As such competition would be almost necessarily ruinous to the company, it was little more than an agreement that the city would carry out the contract in good faith.*

"An agreement of this kind was a natural incident to the main purpose of the contract,—to the power given to the city by its charter to provide a sufficient supply of water, and to grant the right to use the streets of the city for the purpose of laying water pipes to any persons or association of persons for a term not exceeding 25 years. In establishing a system of waterworks the company would necessarily incur a large expense, in the construction of the power house and the laying of its pipes through the streets; and, as the life of the contract was limited to 25 years, it would naturally desire to protect itself from competition as far as possible, and would have a right to expect that at least the city would not itself enter into such competition. It is not to be supposed that the company would have entered upon this large undertaking in view of the possibility that, in one of the sudden changes of public opinion to which all municipalities are more or less sub-

ject, the city might resolve to enter the field itself—a field in which it undoubtedly would have become the master —and practically extinguish the rights it had already granted to the company. *We think a disclaimer of this kind was within the fair intendment of the contract,* and that a stipulation to that effect was such a one as the city might lawfully make, as an incident of the principal undertaking.

"Cases are not infrequent where, under a general power to cause the streets of a city to be lighted, or to furnish its inhabitants with a supply of water, without limitation as to time, it has been held that the city has no right to grant an exclusive franchise for a period of years; but these cases do not touch upon the question how far the city, in the exercise of an undoubted power to make a particular contract, can hedge it about with limitations *designed to do little more than bind the city to carry out the contract in good faith and with decent regard for the rights of the other party.*" (The italics are ours).

It thus appears that the court considered this stipulation in the contract as "little more than an agreement that the city would carry out the contract in good faith;" as "a natural incident to the main purpose of the contract;" as "within the fair intendment of the contract;" and as "an incident to the principal undertaking."

What was the main purpose of the contract in the Walla Walla Case? Clearly to provide a supply of water for the city and its inhabitants. What was the principal undertaking? The undertaking on the part of the company to furnish a supply as provided in Section 7 of the ordinance.

It was held in the Walla Walla Case that the fact that the city was precluded from acquiring a supply and system of its own, except as provided in the ordinance, did not make the franchise granted to the water company an exclusive one, or create a monopoly.

Although there is not in the contract contained in ordinance No. 248, a provision that the city may acquire by

condemnation the plant and supply of complainant, as in the ordinance involved in the Walla Walla Case, nevertheless, it has such right under the law, provided it is authorized to incur an indebtedness therefor.

Long Island Water Supply Co. v. Brooklyn, 166 U. S. 685.

The case of Bienville Water Supply Co. v. City of Mobile, 95 Fed. 539, involved the question of the right of the complainant to an injunction restraining the city of Mobile from acquiring a system of waterworks and furnishing the city and its inhabitants with water. Judge Toulmin, in his opinion in the case, said:

"The equity of this claim depends, in my judgment, upon two inquiries:

First, whether the defendant contracted with the complainant to furnish water to the inhabitants of the city of Mobile, or gave it the right to do so during the continuance of the contract; and second, whether the defendant covenanted with the complainant not to build or acquire waterworks of its own during the continuance of said contract.

"The city of Mobile granted to complainant no rights or privileges whatever. The legislature of the state granted it the right to build waterworks, and to use the streets of the city of Mobile for laying pipes, mains, etc., for water purposes, and, among other things, authorized it and the city of Mobile to contract together for supplying said city with water. They made a contract, but there is no provision in it for furnishing the inhabitants of Mobile with water, and no stipulation on the part of the complainant to do so; but it is clear that the parties contemplated that the complainant would contract with inhabitants of the city to supply them with water for domestic purposes, for it is stipulated in their contract that the complainant shall not charge for water supplied for domestic purposes higher rates than those specified in the contract. It did not fix rates to be charged the inhabitants of the city for water, but stipulated only for a maximum rate to be charged. * *

"We have seen that it does not attempt to grant any exclusive right to the complainant, *and that it contains no provision that the complainant shall furnish water to the inhabitants of the city of Mobile,* and no covenant by the city that it will not build or acquire waterworks of its own, or abstain from supplying water to its inhabitants, during the continuance of the contract. The parties might have made such a contract, but they did not do so." (We have italicized).

The franchise in the Bienville Case was not granted by the city, as in the case at bar. The city did not contract for a supply for the inhabitants, nor give the company the right to furnish water to the inhabitants. The franchise was granted directly by the legislature, and the city made a contract for a supply for itself. If the city had contracted for a supply for the inhabitants, or had conferred upon the company the right to furnish water to the inhabitants, or the contract had contained an express provision precluding the city from acquiring its own supply and plant, then a case entitling the complainant to the relief demanded would have been presented. There was no contract whatever between the city of Mobile and the company with reference to furnishing water to the inhabitants, except a contract fixing the rates in the event the company should furnish water to the inhabitants.

An appeal was taken in the case to this court; 175 U. S. 109. In the opinion of the court it is said:

"The circuit court observed that the city of Mobile granted complainant no rights or privileges whatever, but that the legislature of the state granted it the right to build waterworks and to use the streets of the city for water purposes, and authorized complainant and the city to contract together for the purpose of supplying the city with water. *The contract was made, but there was no express provision in it for furnishing the inhabitants with water, and no stipulation by complainant that it would do so,* though it was clear that the parties contemplated that complainant

would contract with the inhabitants to supply them with water for domestic purposes, since it was stipulated that complainant should not charge for water so supplied higher rates than those specified therein. On the other hand, the city was authorized and empowered by its charter and the act of the legislature of November 30, 1898, to build or otherwise acquire waterworks of its own to supply water to itself and its inhabitants for the extinguishment of fires and for sanitary and domestic purposes, and the city in its contracts with complainant did not agree not to do so. It did agree to pay complainant for a certain number of hydrants erected and supplied by it, and to make the payments monthly, but there was no averment that the city had by act or word repudiated its obligation, or failed or refused to make the payments stipulated for, or that it intended to do so." (The italicizing is by us).

It thus appears that this court based its decision upon the following facts:

1. The contract did not provide for furnishing water to the inhabitants of the city.

2. There was no provision precluding the city from acquiring its own waterworks and supply.

When a franchise is granted to construct a street railway, it is contemplated by the parties that the railroad will be constructed and operated. If, however, there is no provision obligating the company to operate the road, the grant amounts to a mere license.

> State ex rel Knight v. H. P. & L. Co., 22 Mont. 391. See also President, etc., v. Canandaigua, 96 Fed. 449.

We therefore submit that the case of Bienville Water Supply Co. v. Mobile, when taken in connection with the Walla Walla case, clearly affirms the doctrine that where a city enters into a contract by which it contracts for a supply of water for its inhaibtants, or confers the right to furnish water to the inhabitants, the city is precluded from acquiring its own supply and system, and engaging in

the business of furnishing water to the inhabitants, in competition with the person or company with whom it has contracted.

The case of Skaneateles Water Works Co. v. Skaneateles, 184 U. S. 354, is relied upon by counsel for appellee. The facts in this case clearly distinguish it from the case before the court. In the opinion it is said:

"The contract to which reference is made is not the one which was entered into in 1891 between these parties for the term of five years, because that contract was fully carried out and had expired by its own limitation in February, 1896, but it is the contract which the plaintiff in error claims was implied by reason of its organization and incorporation in 1887, in pursuance of an application made to, and with the consent of the village authorities, and under the provisions of chapter 737 of the Laws of New York of 1873, and the acts amendatory thereof."

It is also said:

"Having before it the above act of 1873, amended in 1877, the court of appeals, in People ex rel. Mills Waterworks Co. v. Forrest, 97 N. Y. 97, 100, decided in 1884, said that 'the state authorized the formation of waterworks companies in its towns and villages (Laws of 1877, chap. 171), but it does not require one so organized to supply water to the town or village, nor does it require the town or village to take its supply of water from the company so formed.'"

The court further says:

"Now, while the parties are prohibited from contracting for more than five years without a vote of the electors, which was not taken, how can it be said that when they contracted only for the time permitted by the legislature, there was nevetheless an implied contract that the village would never avail itself of the right provided by statute, without purchasing or condemning the property of the plaintiff? No such condition is stated in any statute. We cannot see any solid foundation for the claim that there was a final and conclusive election of methods by the vil-

lage, out of which sprang the implied contract contended for, when the legislature at that very time prohibited a contract for more than five years. * * * We can appreciate the argument that the village had no right to build and use its own plant during the running of the five years' contract, but we fail to see the force of the claim that, on account of once making a contract with the plaintiff for five years, the village irrevocably bound itself by an implied contract never to build its own plant without taking by condemnation the property of the plaintiff if the parties could not agree on terms of purchase."

We find then that the village merely gave its consent as provided in the Act of 1873, and afterwards made a contract for a supply of water, the term of which was limited to a period of five years. After this contract had expired, there was no obligation to furnish water imposed by any contract between the water company and the village. If there had been such an obligation, it is apparent from the language used in the opinion that the right claimed by the city would have been denied.

In the case of Joplin v. Southwest Missouri Light Co., 24 Sup. Ct. Rep. 43, it was claimed by the light company that by virtue of the grant of the franchise the city had precluded itself from engaging in the business of furnishing light to the inhabitants. In other words, the same contention was made as in the Skaneateles Case, 184 U. S. 354; and in the Bienville Case, 175 U. S. 109. There was no pretense of any contract whereby the light company had obligated itself to furnish light to the inhabitants of the city of Joplin. The proposition presented was with reference to the construction of the grant of the franchise, and did not involve the question of the construction of any contract such as that involved in the case at bar. The case was controlled by the decisions in the Bienville and Skaneateles Cases.

As we have already shown, a municipal corporation in

providing a supply of water for itself and its inhabitants exercises its private or business power. The right of the municipality to furnish such supply itself is a privilege and not a duty. The right to exercise such a privilege can be contracted away. In every case where the right of the municipality to engage in the business of furnishing its inhabitants with water is asserted and denied the material inquiry is whether or not a contract has been entered into by which it is agreed that the privilege would not be exercised. Where there is no contract, as in the Skaneateles Case, it of course follows that the privilege remains with the municipality.

In neither the Bienville, Skaneateles, nor Joplin Case, did the ordinance considered contain a provision imposing the contractual obligation to serve the inhabitants, and it is this fact which distinguishes these cases from the case at bar. In the ordinance involved in the Walla Walla Case it was provided in sec. 7 that the water company should furnish water to consumers at all times during the period of twenty-five years. It was this provision of the ordinance which called forth the expressions of this court that the agreement that city would not engage in business in competition with the water company "was little more than an agreement that the city would carry out the contract in good faith;" "was a natural incident to the main purpose of the contract;" "was within the fair intendment of the contract;" and "was incident to the principal undertaking."

Par 9 of the bill of complaint in the case before the court reads as follows:

"That in complying with the terms, conditions, and provisions of said ordinance and contract the said Helena Consolidated Water Company expended a large amount of money, aggregating several hundred thousand dollars, in acquiring a water supply and system through and by

which to furnish water to said city and its inhabitants, as by said ordinance required, which said system and supply was accepted by said defendant as complying with the requirements of said Ordinance No. 248." (Record, p. 2.)

The truth of these allegations is admitted. (Record, p. 30.) It is a cardinal rule in the construction of all contracts that the intention of the parties, when ascertained, shall control. In determining the intention of the parties to the contract under consideration, the facts alleged in paragraph 9 of the bill, and which are admitted, are very material. As said in the opinion in the Walla Walla Case:

"It is not to be supposed that the company would have entered upon this large undertaking in view of the possibility that, in one of the sudden changes of public opinion to which all municipalities are more or less subject, the city might resolve to enter the field itself,—a field in which it undoubtedly would have become the master,—and practically extinguish the rights it had already granted to the company."

See also on this branch of the case:

Westerly Water Works Co. v. Westerly, 75 Fed. 181.

White v. Meadville, 35 Atl. 695.

In the case at bar it is not reasonable to suppose that the Helena Consolidated Water Company would have entered into a contract to supply water to all of the inhabitants of the city of Helena desiring to purchase the same, during the full term of twenty years, which involved an expenditure of hundreds of thousands of dollars with no opportunity for a return of its investment except from the consumers of water, unless there was an implied understanding and agreement that the city would not take away the benefits to be realized from such contract. If the position of the city is correct, it can install a system in the thickly populated and business portions of the city where

the earnings are large in proportion to the construction and maintenance cost of the system in such parts of the city, and demand of the appellant that it shall perform its contractual obligation of furnishing water in the outlying districts where there are but few consumers along each street. Neither can it be supposed that the parties to the contract would have stipulated for maximum rates, as in sec. 16 of the ordinance, (Record, p. 14), if it had been understood that the city itself might engage in the business of furnishing water. If the city can become a competitor of appellant, it might and probably would prevent the appellant from performing its contractual obligation to furnish water to anyone desiring to purchase, at the rate specified in the ordinance. The business of the appellant might and probably would be curtailed to such an extent that it would be impossible for it to realize sufficient money from those to whom it would furnish water to enable it to continue the operation of its plant and thereby perform its contract. This certainly was not the intention of the parties when ordinance No. 248 became operative. As we have already shown, if the city had merely granted a license or franchise to occupy the streets, and had not made such a contract as that evidenced by ordinance No. 248, the appellant could at any time discontinue its business, which it cannot do by reason of the contract made.

In the case of U. S. v. Babbit, 66 U. S. 55 the court said:

"What is implied in a statute, pleading, contract, or will, is as much a part of it as what is expressed."

In the case of Manistee Iron Works Co. v. Shores Lumber Co. 65 N. W. 863, the court said:

"It is a well known rule of law that every contract must be construed as if those terms which the law will imply were expressly introduced into it; that, where a contract is so framed that it binds the party contracting to do the act,

it will imply a correlative obligation on the party to do what is necessary on his part to enable the party so contracting to fulfill his part of the contract."

See also Canal Co. v. Coal Co. 8 Wall. 288.
Churchward v. Reg., L. R. 1 Q. B. 195.
Coghlan v. Stetson, 19 Fed. 727.
St. Louis Co. v. Tierney, 5 Colo., 582.

In the case at bar, if the city is permitted to acquire a plant and supply, and furnish water to the inhabitants of the city, it will thereby deprive the appellant of the right, and prevent it from earning the money with which, to perform its obligation to furnish and sell water to the inhabitants of the city imposed by the contract, contained in Ordinance No. 248. Under such circumstances, in view of the rule announced by the foregoing authorities, the correlative obligation on the part of the city to refrain from doing anything which will interfere with or prevent the performance by appellant of the obligation to furnish and sell water to the inhabitants of the city is clearly implied.

Assuming that the city had the power at the time of the passage and approval of Ordinance No. 248 to acquire a water plant and supply to be owned and controlled by itself, and also to enter into a contract with others for a supply for itself and its inhabitants, having made a contract with the Helena Consolidated Water Company for a supply its power was exhausted, and it cannot acquire a plant and supply during the life of such contract. In other words, it could not adopt both methods, and the adoption of one precluded the adoption of the other.

White v. Meadville, 35 Atl. 695.

Counsel for appellee argued in the lower courts that the ordinance does not impose any obligation upon the City of Helena or its inhabitants to purchase water from appellant. Attention was called to the language of the first sec-

tion of the ordinance, by which it is contended that it was left optional with the city and its inhabitants to take water from complainant. Great emphasis was placed upon the word "desire" which appears in this section of the ordinance. It was said that all of the provisions of the ordinance can be construed to harmonize with this view.

We do not now contend, and never have contended, that the ordinance imposes any obligation whatever upon the inhabitants of the City of Helena to purchase water from complainant. It was not within the power of the city to make such a contract so far as the inhabitants were concerned. The right of personal liberty enjoyed by the people does not admit of such a contract. The only right which the city could confer was the right to sell to the inhabitants desiring to purchase.

We do not base our claim of an implied contract upon the proposition that the city agreed that the inhabitants should purchase water. What we maintain is—that the City of Helena has contracted that it will not sell water to the inhabitants,—not that the inhabitants shall buy from appellant. It is entirely optional with every inhabitant to purchase water from appellant, or procure water from any other source. A person engaged in a private business or enterprise may sell the good-will of his business, and contract that he will not engage in a like business within a certain locality, but he cannot contract that his customers shall purchase from his successor. A person may have the right to sell a patented article within a certain territory, and he may sell that right and enter into a contract that he will not become a competitor within that territory. Such a contract would not impose upon the people any obligation to purchase such patented article.

We admit that the City of Helena has the authority to grant a franchise to another corporation to construct, maintain, and operate a water system in the City of Helena,

and that the inhabitants of said city would have an absolute right to purchase water from such corporation in preference to taking water from appellant. We again repeat that the proposition we contend for is that the City of Helena itself cannot rightfully sell water to the inhabitants,—that it has contracted away its privilege to do so.

It was neither claimed nor held in the Walla Walla Case that the city had by the contract entered into with the water company imposed any obligation upon the inhabitants to purchase water from the company. The controlling feature of the case was that the city had contracted that it would not supply water to the inhabitants. In other words, the city had agreed to waive the privilege of engaging in business as a competitor of the company. It was said in the opinion in the Walla Walla Case that the franchise granted was not exclusive, and that the city had the right to grant a similar franchise to another corporation.

THE RULE OF STRICT CONSTRUCTION INVOKED BY THE CIRCUIT COURT OF APPEALS IS NOT APPLICABLE IN THIS CASE.

The rule that grants by the legislature or by a municipality are to be strictly construed, and any doubt or ambiguity resolved in favor of the public which was invoked by the circuit court of appeals in this case, does not apply to a contract which is entered into with a municipality in the exercise of its business or proprietary powers. This rule only applies to the construction of grants by the sovereign power, and then only to such grants as are made without consideration.

In Washburn on Real Property, (6th Ed.), Vol. 3, p. 173, it is said:

"The strictness of construction in favor of the sovereign

and against the subject applies only in cases where there is a real uncertainty or ambiguity in the terms of the grant. Nor, as it seems, is the rule applicable where the grant is for a valuable consideration. In such case the rule of construction between the government and the subject is the same as between private grantors and grantees." See also Langdon v. Mayor, 93 N. Y. 147; Hyman v. Read, 13 Cal. 444.

By Ordinance No. 248 the city of Helena made a proposition to grant a franchise for certain considerations therein specified. This being true, the grant should be treated the same as a grant from a private citizen, and the presumptions are *"contra proferentem."*

But however this may be, the appellant does not contend that the implied contract relied upon is an incident to the grant. The implied contract on the part of the city results from the express contract on the part of the grantee of the franchise, its successors and assigns, to supply water to the inhabitants. In the case at bar the contract referred to should be treated and regarded independent of the grant of the franchise, and the same as though the franchise had been granted by the legislature direct. When so treated, the contract is subject to the same rules and principles of construction that are applicable to contracts between individuals.

IT DOES NOT FOLLOW FROM THE FACT THAT THE FRANCHISE IS NOT EXCLUSIVE THAT THE CITY CAN COMPETE WITH APPELLANT.

In the opinion of the circuit court of appeals in this case it is said: "It would seem that if the city has authority to grant a franchise to another corporation to construct and maintain another plant and system for supplying and selling water to its inhabitants, it would have the author-

ity to construct and maintain a system for that purpose itself." (Record, p. 153.) This assumption is entirely unwarranted. Walla Walla Case, 172 U. S. 1. In that case this court held that the city of Walla Walla was authorized to grant to another corporation or company a franchise such as had been granted to the Walla Walla Water Company, but notwithstanding this fact could not engage in business as a competitor with the water company because of the contract it had made.

HAS THE CITY EXPRESSLY RESERVED THE RIGHT TO BECOME A COMPETITOR OF APPELLANT?

The circuit court of appeals in its opinion also held that by virtue of section 3 of said ordinance 248 the city had expressly reserved the right to construct and operate a water plant and engage in the business of supplying water to the inhabitants.

Sec. 3 of the ordinance reads as follows:

"All pipes and mains including service pipes connected therewith, shall be laid at the depth of five feet below the established grade, and shall be laid under the supervision of the street commissioner of said city as to grade and location of streets; and all repairs and extensions of such pipes and mains shall be done under the supervision of said street commissioner as to grade and location in streets. Nothing contained herein shall preclude said City of Helena from regrading or changing the grade of any street or streets within said City or from the construction or maintenance of sewer work, or other works or plants of a public nature, or from letting, giving or granting any franchise, rights or easements to any person or persons, corporation or corporations, whomsoever, *so long as such franchises, rights and easements do not interfere with the franchises, rights and easements hereby granted.* And that said Helena Consolidated Water Company must and shall look solely and exclusively to the person or persons, corporation

or corporations, to whom such franchises, rights, and easements have been given by said city for any and all damages the said Helena Consolidated Water Company may sustain by reason of any interference with any of its pipes, mains or hydrants, or any exposure of the same caused by such person or persons, corporation or corporations." (Record, pp. 10, 11.)

The reservation contained in this section is nothing more than a declaration that the franchise granted is not exclusive, which is conceded by appellant. This section does not assume or purport to deal with the right or obligation to furnish water to the inhabitants. If other provisions of the ordinance confer the right and impose the contractual obligation to furnish water to the inhabitants, as contended by appellant, the reservation made cannot by any principle of construction affect the same. It is a cardinal rule in the construction of contracts and statutes that all provisions must be construed together.

The purpose of sec. 3 is to obviate any claim that the city, by granting the franchise, waived or released its right of control over the streets, avenues, or public grounds of the city. The right of the city to engage in the business of furnishing water to the inhabitants is not to any extent dependent upon its right to occupy the streets with pipes and mains. The question presented in this case must be decided without regard to the power of the city to grade the streets or occupy the same with works of a public nature.

The evident meaning of "other works or plants of a public nature" in said section 3 is any works or plants of a public nature except water works for commercial purposes. The mention of sewers, which are necessarily connected with a water supply, excludes the idea that water works were intended to be embraced within the expression "other works of a public nature."

* * * * *

Counsel for the city argued in the lower court that to construe the contract as prohibiting the city from engaging in the business of furnishing water to its inhabitants would make the same against public policy. This argument is fully answered by the opinion in the Walla Walla Case, 172 U. S. 1, in which this court said: "As the contract in question was expressly limited to twenty-five years, and as no attempt was made to grant an exclusive privilege to the water company, the city seems to have acted within the strictest limitation of the charter." The court further said: "Nor do we think the contract objectionable in the stipulation that the city would not erect water works of its own during the life of the contract.

* * * * *

The circuit court of appeals in its opinion in this case says with reference to sec. 6 of the ordinance, which provides for a supply of water for both the city and its inhabitants for a period of five years: "It might also be construed as an implied agreement that the city would not establish a plant of its own for the purpose of supplying water to its inhabitants or for its own purposes during that period." (Record, p. 156). It follows from this that if the agreement referred to in sec. 26 is not limited to the period of five years, there is an implied contract that the city will not at this time establish a plant of its own for the purpose of supplying water to its inhabitants, according to the view taken of the matter by the circuit court of appeals.

* * * * *

We therefore respectfully submit that the decree of the circuit court in this case was proper, unless the plea of estoppel by judgment should have been sustained.

Is there an Estoppel by Judgment as Claimed in Behalf of the Appellee?

The judgment relied upon was rendered and entered in an action commenced in the state court by the Helena Consolidated Water Company against the city of Helena. The complaint in the action is found in the record on page 53. The opinion of the supreme court in the case appears in the record on pages 117 to 125 inclusive.

It appears from the bill of complaint as amended and from the agreed statement of facts that the appellant acquired title to all of the rights, privileges and franchises granted and conferred by Ordinance No. 248, and the contract therein contained, and all other property of the Helena Consolidated Water Company through the foreclosure of mortgages, executed, acknowledged and delivered many years prior to the commencement of the action by the Helena Consolidated Water Company against the city of Helena in which the judgment relied upon as a defense was rendered. (See amendment to bill of complaint, Record, pp. 41 and 42; original bill of complaint, pars. 10 and 11, Record, pp. 3-4; and agreed statement of facts, Record, p. 44). It is not pretended or claimed that the trustees named in said mortgages, or the bondholders, were parties to the action in which said judgment was rendered. Under these circumstances the judgment pleaded cannot operate as an estoppel against appellant or have any effect whatever upon the right of appellant to maintain and prosecute this suit. This proposition is settled beyond controversy by the following cases:

Keokuk & Western R. Co. v. State of Missouri, 152 U. S. 301.

Keokuk & Western R. Co. v. County of Scotland, 152 U. S. 318.

Louisville Trust Co. v. Cincinnati, 76 Fed. 296.

Andrews v. National Foundry, etc. Works, 77 Fed. 774.

Hassal v. Wilcox, 130 U. S. 493.
Campbell v. Hall, 16 N. Y. 575.
Trust Co. v. Folsom, 75 Fed. 929.

In the case of Keokuk & Western R. Co. v. Missouri, *supra*, Mr. Justice Brown in delivering the opinion of the court said:

"While a mortgagee is privy in estate with a mortgagor as to actions begun before the mortgage was given, he is not bound by judgments or decrees against the mortgagor in suits begun by third parties subsequent to the execution of the mortgage, unless he or someone authorized to represent him, like the trustee of a mortgage bondholder, is made a party to the litigation, although it would be otherwise if the mortgage were executed pending the suit or after the decree."

It also appears that the ordinances and action of the city council which it is claimed impair the obligation of the contract between the city and appellant are not the same as the proceedings of the city council and the acts of the officials involved in the case so commenced by the Helena Consolidated Water Company. The ordinances and resolutions, pursuant to which the city now proposes to acquire a water system and supply and engage in the business of furnishing its inhabitants with water, were not passed and adopted until several years after the judgment relied upon was rendered. It was an entirely different, separate and independent violation of the contract which was complained of in that case. In other words, the cause of action in the present suit is not the same cause of action which was decided in the former case between the Helena Consolidated Water Company and the city. The question of whether or not the city, by acquiring a water plant and supply and engaging in the business of furnishing water to its inhabitants, would violate the obligation of the contract with complainant, was not presented or considered in the action in which the judgment relied upon as a defense in this case

was rendered. It follows that the judgment would not operate as an estoppel even though the appellant herein was bound thereby.

Cromwell v. Sac County, 94 U. S. 351.
Philadelphia v. Ry. Co., 24 Am. St. Rep. 512.
Nesbitt v. Independent District, 144 U. S. 618.

SHOULD THE DECREE BE LIMITED TO RESTRAINING THE CITY FROM FURNISHING WATER TO THE INHABITANTS, THEREBY PERMITTING THE CITY TO ACQUIRE A PLANT AND SUPPLY FOR SUCH PURPOSE?

In the bill of complaint it is alleged: "That the indebtedness of the defendant, the city of Helena, is now and has been for several years last past in excess of three per cent of the assessed value of all the taxable property in said city, as determined by the assessment for state and county taxes during each and all of said years." (Par. 22, Record, p. 6). This allegation is admitted. (See par. 3 of agreed statement of facts, Record, p. 45).

In view of the fact that the city of Helena is indebted in excess of the limit prescribed by Sec. 6, Art. XIII of the constitution, it cannot procure a water supply except by virtue of the proviso in said action. The grant of power to procure such water supply is upon the condition that the revenues to be derived from the supply shall be applied to the payment of the indebtedness incurred therefor. It follows that if the city has by contract precluded itself from selling water, it has also disabled itself from procuring a supply by virtue of the authority granted in the provision of the constitution above referred to.

We therefore respectfully maintain that the city is not authorized to incur an indebtedness for a system or supply for the purpose of furnishing water to the inhabitants until

it is in a position where it can derive a revenue from such system and supply. If it can, eight years prior to the expiration of the contract with appellant, procure a system and supply to be used after the expiration of that contract, it could have procured a system and supply, at the time of the making of the contract, for use in the year 1910.

We submit that in view of the condition of the indebtedness of said city and the constitutional provision above referred to, the city is absolutely without authority at this time to acquire a supply to be used for municipal purposes. As appellant did not appeal from the decree entered, this question, however, is not before the court.

It will be noticed that in the Walla Walla Case the decree was of the same character and as broad in its terms as the decree in the case before the court. (172 U. S. 1).

THE CITY, HAVING PROVIDED A SUPPLY OF WATER FOR ITSELF AND ITS INHABITANTS BY CONTRACT, IS WITHOUT AUTHORITY TO BECOME A COMPETITOR OF APPELLANT.

The city of Helena was created by a special act of the Territorial Legislature in 1881. The charter of the city conferred the following powers, among others, upon the city council: (a) "To make regulations to secure the general health of the inhabitants;" (b) "To provide the city with water, erect hydrants and pumps, build cisterns and dig wells in the streets for the supply of engines and buckets;" (c) "To provide for the prevention and extinguishment of fires." (See charter of city approved Feb. 22, 1881; Laws of 12th Territorial Legislature, p. 112.)

The city became subject to the general municipal corporation act of the state in 1895. This act, as amended by an act approved March 8, 1897, conferred power upon the city council "To adopt, enter into, and carry out means for

securing a supply of water for the use of a city or town, or its inhabitants." (See Session Laws of 1897, p. 212.)

It is alleged in the bill of complaint that the appellant and its predecessors and grantors have fully complied with ordinance No. 248. In the agreed statement of facts it is stipulated that these allegations of the bill are true, (Record p. 44) and that said ordinance is in full force and effect. (Record, p. 49.)

It thus appears that the city has provided a "full, ample, and sufficient" supply of water for itself and its inhabitants. This being true, the only purpose that the city can have in acquiring a supply and installing a system and supplying water to the citizens at this time is to make a profit therefrom.

The powers granted to the city by its original charter and by the general law are not sufficient to authorize the city of Helena to engage in the business of supplying its inhabitants with water solely for the purpose of revenue.

Mauldin vs. City Council of Greenville, 11 S. E. 434.
Ottawa v. Carey, 108 U. S. 110.
Dillon on Municipal Corporations (4th Ed.) pp. 235-6-7.

DOES SEC. 6 OF ART. XIII OF THE CONSTITUTION AUTHORIZE THE EXTENSION OF THE LIMIT OF INDEBTEDNESS PROVIDED THEREIN BY A GENERAL LAW?

The purpose of said Section 6 is to prevent the improvident and extravagant expenditure of public funds. It is clearly the intent of this section that when a municipality has reached the limit of indebtedness provided therein, the question of incurring an additional indebtedness for a water supply is to be determined and decided by the Legislative Assembly. The Legislative Assembly is to determine

this matter from a consideration of the facts of each particular case. The passage of a special act is clearly contemplated. A general law on the subject is unauthorized. The Legislative Assembly may extend the limit as to a particular municipality, and the question of whether or not the indebtedness shall be incurred is to be determined by a vote of the taxpayers in that municipality.

By changing the phraseology of the section without affecting the meaning it would read: "The Legislative Assembly may extend the limit mentioned in this section when such increase is necessary to construct a sewerage system or procure a supply of water for such municipality." As one city may need a sewerage system or water supply, while another municipality may already be provided therewith, the necessity for an increase of the indebtedness is necessarily determined with reference to the facts in each particular case.

If the Legislative Assembly can pass a general law, taxpayers in cities throughout the state are without the protection this section was intended to provide. Instead of the necessity being a matter for determination by the Legislative Assembly it would be a matter for the decision of each municipality. The intent to place the question beyond local influence and overcome the general disposition on the part of the municipal authorities to be extravagant and improvident would be entirely frustrated.

If a general law had been contemplated, the provision that the legislative assembly may extend the limit would not have been incorporated in the section. All that would have been required is a proviso that the three per cent. limit shall not apply to an indebtedness incurred for a sewerage system or a water plant and supply to be owned and controlled by the city, and the revenues from which are to be devoted to the payment of the indebtedness incurred therefor. A general law nullifies the constitutional

authority conferred upon the legislature to determine the necessity for extending the limit. Furthermore, as a municipality can only act by virtue of granted powers, it did not require constitutional authority for the legislature to pass a general law. The constitution of a state is a limitation upon legislative power and not a grant thereof.

Sec. 26 of Art. V of the constitution of Montana, cited by the circuit court of appeals in its opinion, provides against special legislation where a general law can be made applicable. If our construction of Sec. 6 of Art. XIII is correct, a general law cannot be made applicable, and special legislation contemplated thereby is not prohibited by Sec. 26 of Art. V.

We therefore submit that a special act is required, and that Subd. 64 of Sec. 4800 of the Political Code of Montana, as amended, by virtue of which the city of Helena claims authority to incur the indebtedness in question, is unconstitutional.

THE CITY IS PRECLUDED BY THE PROVISIONS OF SUBD. 64 OF SEC. 4800 OF THE POLITICAL CODE, AS AMENDED IN 1897, FROM ACQUIRING A PLANT AND SUPPLY OTHER THAN APPELLANT'S.

We maintain that under a proper construction of Subd. 64 of Sec. 4800 of the Political Code, the city is precluded from acquiring a supply and system, except the supply and system of complainant. It is true that in the case of Helena Consolidated Water Company v. Steele, 20 Mont. 1, it was held that a somewhat similar statute was unconstitutional. There has, however, been no decision of the supreme court of the State of Montana relative to the validity or construction of the provision of subdivision 64

relied upon. This statute was adopted long after the case referred to was commenced.

The decision of the Supreme court in 20 Mont. 1, is clearly erroneous. The court assumed that it was compulsory upon the city to acquire the existing plant whether it desired to own a water plant or not. This assumption was made the basis of the decision. As a matter of fact the statute, like the provision of Subd. 64 referred to merely provided that *if the city elected to acquire a plant it should take the existing plant.* It was optional with the city whether it should acquire a plant. The effect of the statute is the same as the effect of the contract considered in the Walla Walla Case.

In the opinion in the case of Citizens Gas Light Co. v. Wakefield, 161 Mass. 432, the court said: "The Legislature might have authorized cities and towns to erect and maintain such plants without requiring the cities or towns to purchase any existing plant of this kind belonging to private persons or a corporation, but it has not done so. Under this statute a city or town is not required to establish any such plant, and private persons or corporations are not required to sell to any city or town any existing plant. In this respect, there is nothing compulsory in the statute. But if a town chooses to act under the statute, it must act in accordance with its provisions and take the burdens with the benefits."

We submit that this court, in determining the validity of the statute in question, is not bound to follow the decision of the supreme court of Montana involving an entirely different statute, although somewhat similar in its provisions. We further submit that the decision of the supreme court of the State is unsound, and should not even be regarded as an authority.

HAS THE APPELLANT, BY THE AGREED STATEMENT OF FACTS, WAIVED ITS RIGHT TO PRESENT THE QUESTION OF CONSTRUCTION OF SEC. 6 OF ART. XIII OF THE CONSTITUTION; AND THE QUESTION OF THE CONSTITUTIONALITY OF THAT PART OF SUBD. 64 OF SEC. 4800 OF THE POLITICAL CODE, AS AMENDED, REQUIRING THE PURCHASE OF THE EXISTING PLANT AND SUPPLY?

In the agreed statement of facts it is stipulated: "That the revenue for said purpose (the purpose of acquiring a plant and supply) will be created and raised by borrowing money or raising funds within the limit of indebtedness, as heretofore or hereafter to be extended in accordance with the requirements of the Constitution and the provisions of the statutes of the State of Montana in that behalf, unless it shall be adjudged that it has no legal or equitable right to do so on account of the facts and admissions hereinbefore stated and made." (Record, p. 49).

This statement certainly cannot be tortured into an agreement that the general law enacted—Subd. 64 of Sec. 4800 of the Political Code, as amended—is authorized by the provisions of Sec. 6 of Art. XIII of the Constitution. Neither can it be construed as an admission by appellant that that part of said Subd. 64 requiring the purchase of its plant and supply is unconstitutional. It is apparent that the city regards the general law in force as conferring authority to incur the necessary indebtedness for a plant and supply, and intends to follow the same, which is in violation of the Constitution. It is also apparent that the city does not consider that there is any obligation resting upon it to acquire the plant and supply of appellant.

The stipulation referred to is simply an agreement that the city proposes to observe the requirements of the pro-

visions of Subd. 64 relating to the creation of an indebtedness for water works.

DOES THE INJUNCTION GRANTED BY THE CIRCUIT COURT VIOLATE SEC. 720 OF THE REVISED STATUTES OF THE UNITED STATES?

In Par. 20 of the bill it is alleged: "And your orator further shows that the said defendant, the city of Helena, pursuant to said ordinance No. 483, has commenced an action in the district court of the first judicial district of the State of Montana, in and for the County of Lewis and Clarke, against certain of the owners and claimants of the right to the use of the waters of McClellan Creek, a stream of water situate in Jefferson county, Montana, for the purpose of acquiring by the exercise of the right of eminent domain the right to the use of 350 inches of the waters of said McClellan Creek to supply the said City of Helena and its inhabitants with water, which said action is now pending and undetermined." (Record, p. 9).

By reason of the agreed statement of facts, the effect of the injunction granted upon certain other actions referred to in the plea to the jurisdiction (Record, pp. 26 to 28 inc.) is not before this court.

It is contended by counsel for the city that the effect of the injunction granted by the circuit court is to stay the proceedings in the action instituted by the city to acquire by the exercise of the right of eminent domain the right to the use of the waters of McClellan Creek.

It should be noted that the appellant in this case is not a party to the action pending in the state court. It should also be noted that by the prayer of the bill of complaint a writ of injunction is not sought which would in terms stay said action.

It cannot be denied that the circuit court would have jurisdiction, if this suit had been instituted before the commencement of the action referred to. It would have jurisdiction, because the amount in controversy exceeds the sum of two thousand dollars exclusive of interest and costs, and there is not only a Federal question presented, but there is also a diversity of citizenship.

The right to the relief demanded does not to any extent depend upon the commencement of said action. The purpose of alleging in the bill the institution of condemnation proceedings in the district court of Lewis and Clarke county was to show the intent of the city to acquire a supply and system. The allegations with reference to such action stand in the same relation to the relief demanded as the allegations regarding the acquiring by the city of the right to the use of the waters of Beaver Creek. These allegations can answer no other purpose. They can all be stricken from the bill without in the least affecting its sufficiency. The intent of the city is clearly manifest from the passage and approval of the ordinances and resolution complained of, and it was not necessary to go further and allege that action had been taken as therein authorized.

We have then a suit based upon a cause of action which existed prior to the commencement of the condemnation proceedings in the state court, and which was clearly within the jurisdiction of the circuit court of the United States. In other words, if this suit had been commenced before the institution of the action mentioned in the state court, there could be no question as to the jurisdiction of the circuit court to issue the injunction applied for.

Does the fact that the city of Helena, perhaps expecting the institution of this suit and with a view to defeating the jurisdiction of the circuit court, has commenced said action in the state court, prohibit the circuit court from taking jurisdiction of this suit which presents a cause of

action in no wise arising from the institution of such action, and which existed prior to the time the complaint in that action was filed? Was the appellant precluded from invoking the jurisdiction of the circuit court, in a case clearly within its jurisdiction by virtue of the constitution and laws of the United States, because, perchance, the city which has violated the appellant's rights has commenced an action in the state court which has for its object the realization of the benefits of its wrongful conduct?

The constitution of the United States secures to the complainant the absolute right to invoke the jurisdiction of the circuit court in the present case.

Home Ins. Co. v. Morse, 20 Wall. 445.
Reagan v. Trust Co., 154 U. S. 388.
Barron v. Burnside, 121 U. S. 186.

If said Section 720 of the Revised Statutes of the United States is to be construed to deprive the complainant of the right conferred by the constitution of the United States to maintain this suit in the circuit court, then said section is unconstitutional. The section, however, is not so construed by the federal courts.

R. Co. v. R. Co., 82 Fed. 943.
Marshall v. Holmes, 141 U. S. 589.
N. P. Ry. Co. v. Kurtzman, 82 F. 241.
Arrowsmith v. Gleason, 129 U. S. 86.
Gregory v. Pike, 67 Fed. 833.
Perry v. Sharpe, 8 Fed. 15.

In the case of Gregory v. Pike, 67 Fed. 833, before the circuit court of appeals for the first circuit, the court said:

"With reference to the other question, the appellant relies on Section 720 of the Revised Statutes. But it is now so thoroughly settled that this provision of law does not apply to proceedings incidental to jurisdiction properly acquired by a federal court for other purposes than that of enjoining proceedings in a state court, that the proposition needs no discussion by us."

In the case of Perry v. Sharpe, 8 Fed. 15, Mr. Justice Matthews said:

"This construction of these several provisions of the law is necessary, that they may each have some effect, and restrains the interpretation of Section 720 to cases where the jurisdiction of the courts of the United States is originally invoked for the very purpose of staying proceedings in state courts."

The case of Bank of Kentucky v. Stone, 88 Fed. 383, would seem to be directly in point. A bill in equity was filed by the Bank of Kentucky to restrain the assessment and collection of certain taxes for the benefit of the defendants, the city of Louisville, the county of Franklin and the city of Frankfort. Samuel H. Stone, one of the defendants, was auditor of public accounts for the state of Kentucky; Charles Finley, another defendant, was secretary of state; and George W. Long, also a defendant, was state treasurer. These three officers constituted the state board of valuation and assessment. The bill averred that the complainant had an irrevocable contract with the state of Kentucky by which taxes were limited to a certain amount per share, upon its stock, etc., and that the revenue act of the legislature of Kentucky, passed November 11th, 1892, impaired that contract, and was in violation of the constitution of the United States. In the answer filed it was averred:

"That to grant the injunction prayed for would be, in effect and in fact, to enjoin all proceedings in the state courts for collection of the taxes in controversy, contrary to Section 720 of the Revised Statutes of the United States. The laws of Kentucky authorize the collection of taxes by suit in the circuit and county courts of the state. There is now pending in the Franklin circuit court, at Frankfort, Ky., a suit by these defendants against complainant and others for mandamus to compel the state board of assessment to value and apportion complainant's franchise, and the auditor to certify the valuation and apportionment

thereof to the county clerk of Franklin county, in order to secure collection of the taxes now in controversy herein between these defendants and the complainant."

The case was heard before Harlan, Circuit Justice, and Taft and Lurton, Circuit Judges, upon a demurrer to the bill and a motion for a preliminary injunction. In the opinion it is said:

"One other point remains for consideration. The answer pleads that a mandamus proceeding has been instituted in a state court by the city of Frankfort to compel the board of valuation and assessment to certify the apportioned valuation of the franchises of the complainant; that this mandamus proceeding was begun before the action under consideration, and is pending; and that the preliminary injunction issued by this court will be in effect an injunction against that proceeding in the state court. We do not think so. It is settled that the pendency of a suit in the state court is no bar to a suit upon the same subject-matter in this court. * * * The injunction which we shall grant may be offered as a defense by the board of valuation and assessment in the court where the mandamus proceeding is pending, just as a judgment rendered in one of two pending suits for the same cause of action may be offered by supplemental pleading in the other. The sufficiency of the defense will be for that court. *We do not enjoin any suit at all by our order; all we do enjoin is the certification of the taxes.* That does not require the defendants to disobey an order of any other court, *or restrain their prosecution of a suit therein.* The demurrer to the bill must therefore be overruled, and the preliminary injunction prayed must issue." (We have italicized).

This case was affirmed by the Supreme Court of the United States, 174 U. S., Book 43; 1187.

In that case there was a cause of action which did not arise from, and was independent of, the mandamus proceedings pending in the state court, and over which the federal court had jurisdiction; in this case there is a cause of action which does not arise from, and is independent

of, the condemnation proceedings pending in the state court, and which existed prior to the commencement of such proceedings. In that case the certification of the taxes was necessary to the relief demanded in the mandamus proceedings; in this case the payment of the award of the commissioners or of the judgment which will be obtained in condemnation proceedings is necessary to acquire the property sought to be condemned. In that case an injunction was issued restraining and enjoining the defendants in the mandamus proceeding from certifying the tax; in this case the injunction applied for, if issued, will restrain and enjoin the defendant, the city of Helena, from paying the money necessary to acquire the property sought to be condemned. In brief, the two cases cannot be distinguished.

The real purpose and object of the bill of complaint in this case is to have the ordinances and resolution, which it is claimed operate to impair the obligations of the contract between the complainant and the city, declared null and void. It is necessary for the court to adjudge said ordinances and resolution void before granting any relief. As incidental to the principal relief to which the appellant is entitled, it is proper for the court to issue an injunction, for the same reason that the court is authorized to restrain the enforcement of a judgment of a state court which is sought to be cancelled, set aside, and vacated in a federal court. The issuance of such an injunction is authorized by Section 716 of the Revised Statutes of the United States.

The appellant in this case was entitled to a decree annulling and declaring void the ordinances and resolution complained of under the general prayer for relief contained in the bill.

Tyler v. Savage, 143 U. S. 79.
Jones v. Van Doren, 130 U. S. 684.

The plea in this case is insufficient. It does not appear

that the state courts have acquired jurisdiction in any of the cases mentioned.

Rodgers v. Pitt, 96 Fed. 668. (Opinion by Hawley, J.).

The pendency of the actions commenced by Palmer and by appellant in the state courts cannot in any manner affect the jurisdiction of this court.

City of North Muskegon v. Clark, 62 Fed. 694.
Defiance Water Co. v. Defiance, 100 Fed. 178.
Watson v. Jones, 13 Wall. 679.

The plea, so far as it relates to the cases commenced by Palmer and by appellant in the state courts, is insufficient.

Green v. Underwood, 86 Fed. 427.
Griswold v. Bacheller, 77 Fed. 857.

An examination of the authorities will disclose that the provisions of Section 720 of the Revised Statutes of the United States, do not prohibit a circuit court of the United States from assuming jurisdiction of a case over which it is given jurisdiction by the constitution and laws of the United States, even though it is necessary to the complete exercise of such jurisdiction to issue a writ of injunction, which incidentally has the effect to deprive a party of the benefits of an action or proceeding pending in the state court at the time of the commencement of the suit in the federal court. As said by Grosscup, J. in the case of Railroad Co. v. Railroad Co., 82 Fed. 943:

"In their literal scope, the constitution and statutes conferring jurisdiction, and this Section 720, are in conflict, and to the extent of such conflict, the legal effect of the latter statute must be narrowed down. The cases cited, and a line of cases in the supreme court of the United States, of which they are a development, clearly show that this is the interpretation put upon these two apparently inconsistent lines of legislation."

As also stated by Mr. Justice Matthews in the case of Perry v. Sharpe, 8 Fed. 15:

"This construction of these several provisions of the law is necessary that they may each have some effect, and restrains the interpretation of Section 720 to cases where the jurisdiction of courts of the United States is originally invoked for the very purpose of staying proceedings in state courts."

If, however, this court should be of the opinion that said Section 720 is applicable, and operates to prevent the issuance of an injunction restraining and enjoining the appellee from acquiring the water supply sought to be acquired by such condemnation proceedings, such holding could not defeat the right of the appellant to an injunction preventing the city from acquiring a plant and system and from entering into competition with the appellant by furnishing the inhabitants of the city with water. The prayer of the bill is for a writ of injunction, not only restraining and enjoining the city from acquiring a water supply, but also from acquiring a water plant and system, from engaging in the business of furnishing said city and its inhabitants, or any thereof, with water, and from incurring any indebtedness or expending any money therefor.

The fact that the city may acquire a supply would not prevent the court, after such supply has been acquired, from issuing a writ of injunction enjoining the city from engaging in the business of furnishing its inhabitants with water.

THE OBJECTION THAT THE BILL IS MULTIFARIOUS.

The objection that the bill of complaint is multifarious is clearly waived by the following stipulation contained in the agreed statement of facts, to-wit:

"It is hereby stipulated and agreed between the parties to the above entitled suit, that the following statement of facts may be, and the same are hereby made the facts upon which the trial and determination of all of the questions and issues of law and facts shall be had and a final decree thereupon entered, and that the same may be adopted by said court as its findings herein for that and all purposes of said suit." (Record, p. 44).

It should be noted that the different grounds presented for the relief sought are all based upon the same transaction—the action taken by the defendant the city of Helena, and proposed to be taken, for the purpose of acquiring a water plant and supply, which it shall own and control. It should also be noted that but one relief is demanded.

It is said by the authorities that no general rule has been established which will apply to all cases. Each case must depend upon its own circumstances. Cutter v. Iowa Water Co., 96 Fed. 779.

It is also said that "the objection of multifariousness is one which addresses itself to the sound discretion of the court." Dennison Mfg. Co. v. Thomas Mfg. Co., 94 Fed. 651.

In the case of Barcus v. Gates, 89 Fed. 783, the court said:

"Multifariousness arises from the fact either that the transactions which form the subject-matter of the suit are so separate and dissimilar that they cannot conveniently be tried in one record, or that some defendant is able to say that as to a large part of the transaction set out in the bill he has no interest or connection whatever. A bill is not multifarious because there are several causes of action, if they grow out of the same transaction, and if all the defendants are interested in the same rights, and the relief against each is of the same general character, the bill may be sustained."

In a note found in Daniel's Chancery Pleading and Practice, (5th Ed.) *344, we find the following:

"Neither is a bill multifarious where its allegations all relate to one transaction between the same parties or one and the same subject matter and the same injury; although it may pray for two different methods of relief against that injury. Neither is a bill multifarious because several grounds are set out to show the plaintiff's right to the relief sought."

The following authorities seem to be conclusive that the bill in this case is not multifarious.

Dennison Mfg. Co. v. Thomas Mfg. Co., 94 Fed. 651.
Barcus v. Gates, 89 Fed. 783.
Daniell's Chan. Pl. & Pr., (5th Ed.) *344.
Cauley v. Lawson, 5 Jones Eq. 132.
Hart v. McKeene, Walker's Ch. 417.
Wales v. Newbould, 9 Mich. 45.
Torrent v. Hamilton, 95 Mich. 15.
Pope v. Salamantha Oil Co., 115 Mass. 286.
First Nat. Bank v. Peavey, 75 Fed. 154.
Rosenstein v. Burns, 41 Fed. 841.
Stafford Bank v. Sprague, 8 Fed. 377.
Blake v. Van Tilborg, 21 Wis. *672.
Pullman v. Stebbins, 51 Fed. 10.
U. S. v. American Bell Tel. Co., 128 U. S. 315.
Dyer v. Cramston Co., 24 Atl. 827.
Davis v. Berry, 106 Fed. 761.

In determining whether or not the objection of multifariousness is well taken, the court will look to the convenience of the parties and the expediency in requiring separate bills to be filed.

Carrol v. Roosevelt, 4 Edwards Ch. 211.
Wood v. Pulsifer, 54 Vt. 70.
DeWolf v. Sprague Mfg. Co., 49 Conn., 299.
Dennison Mfg. Co. v. Thomas Mfg. Co., 94 Fed. 651.

We submit that the bill of complaint is not multifarious.

Respectfully submitted,
B. PLATT CARPENTER,
STEPHEN CARPENTER,
M. S. GUNN,
Solicitors and of Counsel for Appellant.